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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 297.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Petitioner,

—against—

GEORGE P. KORTE,

Respondent.

BRIEF ON BEHALF OF THE RESPONDENT, GEORGE P. KORTE, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

RANDOLPH J. SEIFERT,
Attorney for Respondent,
11 East 44th Street,
New York, N. Y.

COUGHLAN, RUSSELL & SEIFERT,
Of Counsel.

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BRIEF ON BEHALF OF THE RESPONDENT, GEORGE P. KORTE, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of the Court Below.

There was no opinion in the trial court, the District Court of the United States for the Eastern District of New York. The opinions of the Court of Appeals for the Second Circuit, not yet reported officially, decided July 24th, 1951, are set out in the Record at pages 285-297.

II.

Summary Statement of the Argument.

1. The decision of the court below was in accord with the many decisions of this Court determining what constitutes sufficient evidence to prove negligence in actions brought under the Federal Employers' Liability Act, and in no wise does the decision rest on speculation.

2. The decision of the Court of Appeals for the Second Circuit in the present case is not in conflict with the decision of the Court of Appeals for the Third Circuit in *Masterson* v. *Pennsylvania R. Co.*

3. There is no conflict, actual or "probable" between the decision in the instant case of the Court of Appeals for the Second Circuit, and the decision of this Court in *Palmer* v. *Hoffman,* nor with the decisions of other Courts of Appeals relying on *Palmer* v. *Hoffman.*

4. Conclusion.

III.

Argument.

Respondent contends that the writ should be denied for the following reasons:

1. The decision of the court below was in accord with the many decisions of this Court determining what

constitutes sufficient evidence to prove negligence in actions brought under the Federal Employers' Liability Act, and in no wise does the decision rest on speculation.

A.

As a preliminary, it should be pointed out that "nothing is involved in this case except the drawing of allowable inferences from a necessarily unique set of circumstances". Review is granted by this Court "only in cases that demand adjudication on the basis of importance to the operation of our federal system; importance of the outcome merely to the parties is not enough." *Wilkerson* v. *McCarthy*, 336 U. S. 53, 66-67 (1949).

> "To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved. * * * A petition for certiorari should explain why it is vital that the question involved be decided finally by the Supreme Court. If it only succeeds in demonstrating that the decision below may be erroneous, it has not fulfilled its purpose."
>
> Vinson, *C. J.*, address to the American Bar Association, reported in 69 Supreme Court Reporter, pages VI-VII (1949).

An important consideration in granting certiorari in this type of case is whether the jury function in passing on disputed questions of fact and in drawing inferences from proof and facts, has been respected,

or will be restored, if this Court intervenes. *Wilkerson* v. *McCarthy, supra,* 336 U. S. 53, 71, citing, *Jones* v. *East Tennessee V. & G. R. Co.,* 128 U. S. 443, 445 (1888); *Washington and G. R. Co.* v. *McDade,* 135 U. S. 554, 572 (1890); *Bailey* v. *Central Vermont R. Co.,* 319 U. S. 350, 353-354 (1943). See, *Moore* v. *Chesapeake & O. R. Co.,* 340 U. S. 573, 574 (1951).

It is submitted that certiorari should be denied in the instant case because:

1. The importance of the question as to the sufficiency of the evidence involves no more than its particular facts.

2. There is no showing that it is vital that the question involved be decided finally by the Supreme Court.

3. The historic function of the jury would be denied rather than respected or restored, if certiorari were granted.

B.

Petitioner misinterprets the decisions of this Court dealing with the question of sufficiency of evidence.

This Court long ago unanimously held that in Federal Employers' Liability Act cases, unless error was palpable, decisions of courts below should not be disturbed where the question presented was whether there were matters for the consideration of the jury.

> "The case, then, is one in which there is no question as to the interpretation of any provision

of the Federal Act or as to the definition of legal principle in its application, but simply involves an appreciation of all the facts and admissible inferences in the particular case for the purpose of determining whether there were matters for the consideration of the jury. The state courts, trial and appellate, held that there were. Having regard to the appropriate exercise of the jurisdiction of this court, we should not disturb the decision upon a question of this sort unless error is palpable. The present case is not of this exceptional character, and we confine ourselves to an announcement of our conclusion."

Great Northern Ry. Co. v. *Knapp,* 240 U. S. 464, 466 (1916).

See also, *Seaboard Airline Ry.* v. *Padgett,* 236 U. S. 668 (1915); *Southern Railway Co.* v. *Puckett,* 244 U. S. 571 (1917); *Parmerlee* v. *Chicago, Milwaukee & St. Paul Railway Co.,* 246 U. S. 658 (1918); *Chicago, Milwaukee & St. Paul Railway Co.* v. *O'Connor,* 248 U. S. 536 (1918); *Going* v. *Norfolk & Western Railway Co.,* 248 U. S. 538 (1918).

Following the 1939 amendments to the Act (53 Stat. 1404; 45 U. S. C., § 54 [1939]), striking out the harsh doctrine of assumption of risk, and otherwise clarifying the rights of the employee, this Court emphasized the announced Congressional intent that these cases be left to a jury.

"It appears to be the clear Congressional intent that, to the maximum extent proper, questions in actions arising under the Act, should be left to the jury."

Tiller v. *Atlantic Coast Line R. Co.,* 318 U. S. 54, n. 68 (1943).

> "To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."
>
> *Bailey* v. *Central Vt. R. Co., supra,* 319 U. S. 350, 354 (1943).

In recent years this Court has made it clear, beyond any question of doubt, that factual considerations are peculiarly for the jury.

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. * * * Courts are not free to re-weigh the evidence and set aside the verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."
>
> *Tennant* v. *Peoria & P. U. Ry. Co.,* 321 U. S. 29, 35 (1944).

> "Once there is a reasonable basis in the record for concluding that there was negligence which caused the injury, it is irrelevant that fair-minded men might reach a different conclusion. For then it would be an invasion of the jury's function for an appellate court to draw contrary inferences or to conclude that a different conclusion would be more reasonable. *Lavendar* v. *Kurn, supra* (327 U. S. 645), p. 652. And where as here, the case turns on controverted facts and the cred-

ibility of witnesses, the case is peculiarly one for the jury." (Parenthical matter supplied.)

Ellis v. *Union Pacific Railroad Co.*, 329 U. S. 649, 653 (1947).

This Court has steadfastly followed such reasoning in Federal Act cases dealing with personal injury:

Blair v. *B. & O. R. Co.*, 323 U. S. 600 (1945);
Cogswell v. *Chicago & E. I. R. Co.*, 328 U. S. 820 (1946);
Pauly v. *McCarthy*, 330 U. S. 802 (1947);
Myers v. *Reading Co.*, 331 U. S. 477 (1947);
Lillie v. *Thompson*, 332 U. S. 459 (1947);
Eubanks v. *Thompson*, 334 U. S. 854 (1948);
Penn v. *Chicago & N. W. R. Co.*, 335 U. S. 849 (1948);
Wilkerson v. *McCarthy*, 336 U. S. 53 (1949);

and it has held likewise in death actions:

Keeton v. *Thompson*, 326 U. S. 689 (1945);
Jesionowsi v. *Boston & Maine R. Co.*, 329 U. S. 452 (1947);
Anderson v. *Atchison, T. & S. F. R. Co.*, 333 U. S. 821 (1948);
Coray v. *Southern Pacific Co.*, 335 U. S. 520 (1949).

In the present case, the facts involved are simple:

"Plaintiff was injured on December 20, 1946, when he wrenched his back trying to open one of the familiar flat steel trap doors or 'traps' which cover the steps on railroad passenger cars and which, when opened, make it possible for passengers to ascend or descend the steps to the

vestibule of the car. He was on train No. 369, going from New Haven to Grand Central Station, New York, and was injured when he tried to open the trap, so that passengers could get off at the 125th Street station in New York" (R. 286).

The evidence indicated that the respondent stepped on the "dog" that releases the trap, but that the trap rather than opening from three to sixteen inches as is normal (R. 191), remained stuck (R. 19, 61, 72, 73, 260). Petitioner's own witnesses testified: that the practice required that the traps be inspected at least twice daily (R. 193-194); that such traps stuck and were out of order (R. 233-234); and that in fact trap doors sometimes stuck so tight that the cars had to be shopped in order that hammers be used to "bang" such doors open (R. 196).

Petitioner offered no direct evidence to contradict respondent's statement of the happening of the accident. Not one witness was produced who actually inspected the cars before or after the accident nor who testified from personal knowledge that the trap doors were in fact in good working condition—this in spite of the fact that respondent personally filed a regular accident report form as required by I. C. C. regulations (R. 69-70) which afforded the opportunity to (actually, required) petitioner to inspect the cars involved, and in spite of the fact that petitioner's witness testified that inspectors in Connecticut and in New York, in the terminals and in the yards, inspected these cars at least twice daily (R. 193-194).

Petitioner makes much of the fact that the release

mechanism or "dog" worked (brief, pp. 4-5). Respondent at all times agreed that it did (R. 19, 60-61).

Clearly involved was a question for the jury whether petitioner was negligent in failing to inspect (or in failing to inspect properly) (R. 287-288), and in having a trap door that was rusty (R. 19, 42, 63, 64); that lacked oil (R. 13, 63, 88-89); and that stuck so tight as to cause the respondent's injuries (Exhibit A, R. 70, 260; 18-19, 42, 74).

And as to petitioner's contention that the accident was not reasonably foreseeable (brief, p. 11), the court below said:

> "It is certainly foreseeable that a man may injure his back or a muscle trying to raise a trap door which, by Mr. Hogan's (petitioner's witness) testimony, weighs '80 pounds without fixtures; with fixtures it runs about 95'. Moreover, Mr. Hogan testified that he had trouble with the trap doors on the New Haven's cars, and in the past had 'shopped' cars to have defective traps repaired. The testimony was thus adequate to support forseeable ability" (R. 288). (Parenthetical matter supplied.)

Petitioner's brief (p. 12) relies on three decisions of this Court to support its assertion that the respondent failed to prove negligence:

New York Central R. Co. v. *Ambrose,* 280 U. S. 486 (1930);
Pennsylvania R. Co. v. *Chamberlain,* 288 U. S. 333 (1933);
Moore v. *Chesapeake & O. R. Co.,* 340 U. S. 573 (1951).

The *Ambrose* case probably does not represent existing law. See *Wilkerson* v. *McCarthy, supra,* 336 U. S. 53, 69 (1949). And there is serious doubt whether the decision in *Pennsylvania R. Co.* v. *Chamberlain* represents the present state of the law, in view of later decisions of this Court. See *Baltimore & O. R. Co.* v. *Poston,* 177 F. (2) 53, 55 (Cir. Ct., D. C., 1949).

But be that as it may, all three cases relied on by petitioner deal with death actions where plaintiff's cases failed for want of direct proof. The instant case is completely different in that there was direct positive evidence of petitioner's negligence offered on behalf of respondent and, ironically enough, a complete lack of such testimony relating to negligence, on behalf of petitioner.

2. The decision of the Court of Appeals for the Second Circuit in the present case is not in conflict with the decision of the Court of Appeals for the Third Circuit in *Masterson* v. *Pennsylvania R. Co.*

A.

Masterson v. *Pennsylvania R. Co.,* 182 F. (2) 793, relied on by petitioner (brief, p. 12) is very much unlike the instant case in several very important factual respects.

In the instant case the record discloses that the entire treatment of respondent's injury was by railroad doctors and at the direction of petitioner's hospital (R. 21-40), with the exception of one unimportant visit by respondent's family doctor when no railroad doctor was available (R. 38).

Dr. Jenkins of the railroad hospital saw respondent

the day following the accident and from then continuously for two and a half or three months (R. 22). Respondent was getting worse, so Dr. Jenkins, after having respondent X-rayed, directed him to Dr. O'Connor, an orthopedic specialist (R. 23). The latter, after examination, directed respondent to go to Dr. Brody, a neuro-surgeon (R. 24). Respondent never knew either doctor before, and went solely at the direction of Dr. Jenkins (R. 26). After examinations by both men, they sent respondent to the New Haven Hospital (not the railroad hospital) where the internes, house doctor, and Drs. Brody and O'Connor examined respondent day and night for three days (R. 24). Dr. Brody did not want to operate unless absolutely necessary, and finally decided against the operation (R. 24) in favor of his previously recommended conservative course (R. 33). Dr. Brody then instructed respondent how to restore the circulation to his legs (R. 39); and Dr. Jenkins requested that respondent's wife report to the railroad hospital for instructions as to how to give treatments at home to Korte, and these treatments were continued down to the date of trial (R. 37).

The diagnoses of Doctors O'Connor and Brody were the working diagnoses of doctors treating respondent, and preparing on the basis of these very reports, to perform a serious operation on his spine.

In the *Masterson* case, the statements in question related to examinations made solely for the purpose of reporting to the railroad's chief medical examiner, in connection with a disputed claim, and not as here, in conjunction with treatments and operation.

> "Actually these letters appear to have been written not as normal or routine records of medi-

cal observation or treatment, but rather as aids in resolving a controversy about legal responsibility. 'Their primary utility is in litigating, not in railroading' or in healing. To admit them would be to bring 'the business of preparing cases for trial' within the purview of the Federal Business Records Act." (Quoting from *Hoffman* v. *Palmer,* 318 U. S. 109, 114 [1943].)

Masterson v. *Pennsylvania R. Co., supra,* 182 F. (2) 793, 797.

In the instant case, the diagnoses of the doctors were made as a basis for treatment; long before any litigation or claim was contemplated or commenced; and not for the purpose of testifying in a possible lawsuit.

B.

The completely different factual situation in the two cases gives rise to an important difference in legal principles applicable to the two cases.

In the instant case it was clear from the outset that the trial judge appreciated that the diagnoses in question were admissions by the petitioner (R. 25-26).

When petitioner objected that the doctors were not railroad doctors, the trial court sustained such objection to the introduction of the diagnoses until proof was forthcoming as to the relationship of the doctors to petitioner (R. 25-26).

Even after such testimony was forthcoming (R. 26), the trial court offered to postpone the trial, to

allow petitioner to either take the depositions of the doctors or to compel their attendance in court by subpoena, thereby offering petitioner the opportunity to rebut the agency relationship (R. 31). Petitioner refused both offers (R. 31).

Finally, the trial court carefully excluded all "hearsay" in the form of case history, and instructed the jury in conformance thereto (R. 29).

The Court of Appeals clearly appreciated the evidentiary application of the rules relating to admissions. Its opinion relies chiefly on *Pekelis* v. *Transcontinental & Western Air,* 187 F. (2) 122 (2d Cir., 1951) (R. 292-293). That case involved the question of the admissibility in evidence of certain reports of the defendant carrier. The Court of Appeals for the Second Circuit found that they were properly admissible as admissions in that they were (a) reports inconsistent with the position taken by the defendant at the trial, and (b) binding on the defendant.

In arriving at its conclusion in the *Pekelis* case, the court quoted from the opinion of Wyzanski, *J.,* in *United States* v. *United Shoe Machinery Corp.,* 89 F. Supp. 349, 352 (D. C., Mass., 1950):

> "Even if the principal does not expressly vouch for the agent's statement, if he acts or conducts his business in such a way as to show by implication that he adopted the statement, then such parts of the statement as he acted upon are 'his'. And to that extent the statement is receivable against the principal as an adoptive admission. Morgan, The Law of Evidence, 1941-1945, 59

> Harv. L. Rev. 481, 559 before note 322; Morgan, Admissions, 12 Wash. L. Rev. 181, 186."

The court below apparently felt that in the instant case the treatment by the doctors and their decision to operate, both based on the diagnoses in question, constituted adoptive admissions; and that "the *Pekelis* case is clear authority for the admission of business entries from these doctors when offered by the plaintiff and not by the entrants or the company for whom they were—temporarily—acting" (R. 293). This Court denied certiorari in the *Pekelis* case, *supra,* 341 U. S. 951 (1951).

In the *Masterson* case, the court expressly found (182 F. (2) 793, 797) no basis for an admission:

> "Much less was it an admission of the truth of the statements contained in the letters. For there was no evidence that these physicians were employees or agents of the railroad whose statements would be binding upon it."

C.

There is an important difference in state law between the decision of the court in the *Masterson* case, *supra,* and the decision of the court below in the instant case, with respect to admissibility of business records.

To hold the documents inadmissible in each case, the respective court would have had to find that the evidence was inadmissible under *both* Federal and applicable state law. Federal (Petitioner's Brief, p. 21) Rules of Civil Procedure, Rule 43(a), 28 U. S. C., § 723(c).

The applicable Pennsylvania statute, the Uniform Business Records as Evidence Act, 28 P. S., § 91b, specifically provides:

> "A record of an act, condition or event shall, in so far as relevant, be competent evidence *if the custodian or other qualified witness testifies to its identity and the mode of its preparation,* and if it was made in the regular course of business at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission." (Italics supplied.)

In the *Masterson* case, no custodian or other qualified witness, testified as required by the state law. 182 F. (2) 793, 797.

In the instant case, far from finding that the applicable state law rendered the evidence inadmissible, the court below would have found that the relevant state statute (Petitioner's Brief, p. 20, Section 374-a of the New York Civil Practice Act) and the decisions based on it, compel a finding that the diagnoses are admissible.

> "The diagnoses were 'records of an act, transaction, occurrence, or event made in the course of the doctor's profession', or the scientific deductions therefrom."
>
> *People* v. *Kohlmeyer,* 284 N. Y. 366, 369 (1940).

Even though the medical witness is in court and available to testify, but does not testify, his report alone is admissible under Section 374-a. *Meiselman* v. *Crown Heights Hospital,* 285 N. Y. 389 (1941).

The lower courts in New York have consistently followed the views set forth above. See *Duffy* v. *42nd St. M. & St. N. A. R. Co.,* 266 App. Div. 865 (2nd Dept., 1943), where a judgment of the trial court in favor of plaintiff was reversed for error in excluding a portion of a certificate showing cause of death; *Mayole* v. *B. Crystal & Son, Inc.,* 266 App. Div. 1008 (2nd Dept., 1943), where a judgment in favor of defendant was reversed for error in excluding portions of medical records; see also, *People* v. *Nisonoff,* 267 App. Div. 356 (1st Dept., 1944), aff'd 293 N. Y. 597, cert. den. 326 U. S. 745 (1945); *Cerniglia* v. *City of New York,* 182 Misc. 441 (Sup. Ct., Kings County, 1944); *In re Monroe's Will,* 270 App. Div. 1039 (2nd Dept., 1946).

That there is no practical distinction between records of physicians and hospital records insofar as admissibility is concerned, see Hayt & Hayt, Law of Hospital, Physicians and Patient (1947), p. 605; Brahan, *J.,* Case Records of Hospitals and Doctors as Evidence under the Business Records Act, 21 Temple L. Q. 113 (1947); 135 ALR 1258; *Freedman* v. *Mutual Life Ins. Co.,* 342 Pa. 404, 21 A. (2) 81 (1941).

Even where admission of a whole record or report was found to be erroneous, it was held proper to receive that portion of the record consisting of diagnoses of doctors. *Bothner* v. *Keegan,* 275 App. Div. 470 (1st Dept., 1949); *Constantinides* v. *Manhattan Transit Co.,* 264 App. Div. 147 (1st Dept., 1942); *Del Re* v. *City of New York,* 180 Misc. 525 (App. Term, 2nd Dept., 1943).

In the *Masterson* case, the documents were excluded by the terms of the Pennsylvania statute; no recourse to state decisions was necessary. In the instant case, the older New York statute, broader in its terms and the subject of much interpretation by the state courts, provides ample basis for admitting the diagnoses in question.

D.

Lastly, there is a basic difference in the circumstances involved in the use of the challenged documents, as between the instant case and the *Masterson* case, *supra*.

In the *Masterson* case, the letters in question were offered in evidence by the plaintiff. There is nothing whatever in the report of the case to indicate that the medical witnesses of either side used the letters involved as bases for their testimony. In fact, the contrary seems to be clearly implied.

In the instant case petitioner used but one medical witness, Dr. Kennedy, who saw respondent but once and that single time for the purpose of qualifying to testify at the trial (R. 148). Petitioner had forwarded to him copies of reports of its doctors including the diagnoses here in question, those of Drs. O'Connor and Brody (R. 165). Dr. Kennedy testified that those reports were read by him preparatory to his examination of respondent (R. 165, 172).

The law is well established that under such circumstances the testimony of the medical witness is inadmissible unless the aids used by him in arriving at his opinions are in evidence. 3 Wigmore, Evidence

(3rd Ed., 1940), § 795; *Nazzaro* v. *Angellini,* 217 App. Div. 415 (3rd Dept., 1926); *Gastiger* v. *Horowitz,* 220 App. Div. 284 (2nd Dept., 1927); *Cellamare* v. *Third Ave. Transit Corporation,* 273 App. Div. 260 (1st Dept., 1948); *Harden* v. *Fahrenkopf & Reufle,* 229 App. Div. 1 (3rd Dept., 1930); Rogers, The Law of Expert Testimony (3rd Ed., 1941), p. 83.

This rule has particular applicability where the medical witness is one whose examinations were solely for the purpose of testifying. *Nashville, C. & St. L. Ry. Co.* v. *York,* 127 F. (2) 606 (6th Cir., 1942); see also, 175 ALR 274.

Petitioner's only medical witness would have been unable to testify unless the documents in question had been in evidence. Even had respondent not offered the diagnoses, petitioner was under a compulsion to do so at the peril of having its medical testimony stricken from the record.

Following this analysis it is apparent that the decision of the Court of Appeals for the Second Circuit in the present case in no wise conflicts with the decision of the Court of Appeals for the Third Circuit in *Masterson* v. *Pennsylvania R. Co.*

3. There is no conflict, actual or "probable" between the decision in the instant case of the Court of Appeals for the Second Circuit, and the decision of this Court in *Palmer* v. *Hoffman,* nor with decisions of other Courts of Appeal relying on *Palmer* v. *Hoffman.*

In *Palmer* v. *Hoffman,* 318 U. S. 109 (1943), this Court held that a statement of the railroad engineer

involved in a fatal collision with an automobile in a grade crossing accident was inadmissible under the Federal Business Records Act, now 28 U. S. C., § 1732.

This Court, in arriving at its decision, stated at page 113:

> "It is not a record made for the systematic conduct of the business as a business. An accident report may affect that business in the sense that it affords information on which the management may act. It is not, however, typical of entries made systematically or as a matter of routine to record events or occurrences, to reflect transactions with others, or to provide internal controls. The conduct of a business commonly entails the payment of tort claims incurred by the negligence of its employees. But the fact that a company makes a business out of recording its employees' versions of their accidents does not put those statements in the class of records made 'in the regular course' of the business within the meaning of the Act."

As stated by the court below, this limitation is aimed at a litigant introducing evidence "built up to promote the self interest of the entrant" or "contrived by the entrant for litigation" (R. 292).

Quite apart from any other considerations, the facts in the instant case are materially different from those in *Palmer* v. *Hoffman*. The diagnoses of the doctors, as has been pointed out were those of doctors whose sole concern was the treatment, and possible operation, upon their patient. The diagnoses were made within days of the happening of the acci-

dent and years before litigation was instituted. Certainly it cannot be said that the making of a diagnosis under these circumstances is not the "business" of a doctor.

Moreover, these diagnoses were not offered by the party at whose behest they were prepared. There is not present the promotion of "self interest of the entrant".

Completely dissimilar also is the fact that in the present case the basis for admission of the documents is found at least partly in the evidentiary rule pertaining to admissions. No possibility of an admission was presented in *Palmer* v. *Hoffman.*

Absent also in the latter case is the important feature that the diagnoses were used by a medical witness as an aid to prepare him to testify in the trial court.

Certainly, if there is no conflict between the decision of this Court in *Palmer* v. *Hoffman* and the decision of the court below in the instant case, there can be no conflict between the cases cited by petitioner (brief, pp. 14-15) as relying on *Palmer* v. *Hoffman,* and the decision below.

4. Conclusion.

Petitioner in the instant case has in no wise met the requirement of this Court, as stated by Chief Justice Taft speaking for a unanimous court in *Layne & Bowler Corp.* v. *Western Well Works,* 261

U. S. 387, 393 (1923), that the writ of certiorari be not granted

> "except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal".

Wherefore, it is respectfully submitted that the petition for a writ of certiorari be denied.

RANDOLPH J. SEIFERT,
Attorney for Respondent.

COUGHLAN, RUSSELL & SEIFERT,
Of Counsel.